Dewan Bahasa dan Pustaka v Merita Merchant Bank Singapore Ltd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1324 OF 2010

ABDUL WAHAB PATAIL, CLEMENT SKINNER AND TENGKU MAIMUN JJCA

28 MARCH 2013

Civil Procedure — Appeal — Interference by appellate court — Whether trial judge failed to give judicial appreciation to evidence — Whether error led to injustice required appellate intervention

Contract — Assignment — Assignment of sums due — Whether there was absolute assignment of payments due under contracts to respondent — Whether appellant was given notice of precise terms of assignment

During the period between 1996 and 1997, Dewan Bahasa dan Pustaka ('the appellant') had awarded Benatulin Timur Sdn Bhd ('BTSB') three contracts for the supply of paper and cardboard, namely the 1996 contracts and the 1997 contract. In order to honour its supply obligations to the appellant, BTSB was covered by a financing facility from Merita Merchant Bank Singapore Ltd ('the respondent'). As security for this facility, BTSB assigned all payments it was to receive from the appellant to the respondent. The respondent filed a civil suit against BTSB and the appellant to recover payments for purchases made under the 1996 contracts and the 1997 contract, which had been assigned to it. The respondent obtained judgment in default of appearance against BTSB but full trial proceeded between the respondent and the appellant. It was the appellant's defence that its consent to the assignment had only been obtained for payments under the 1996 contracts but not the 1997 contract. The trial judge was of the view that the assignment was absolute and not limited to any particular contract and that the supply made under the 1997 contract was an extension of the 1996 contracts. As such, the appellant was ordered to release payments in respect of the 1996 contracts and the 1997 contract to the respondent. This was the appellant's appeal against that judgment. The appellant argued that the 1997 contract was a separate contract from the 1996 contracts and that while its consent had been sought and obtained to the assignment of payments under the 1996 contracts, no similar consent was sought or obtained under the 1997 contract. As such, it was the appellant's case that it was not bound to make payments to the respondent. The respondent maintained that the assignment

to it was an absolute assignment and the notice of it was received and consented to by the appellant.

Held, allowing the appeal with costs:

(1) Although the assignment supported the case for the respondent, the trial judge erred when she overlooked the undisputed fact that the assignment did not itself bear the assent of the appellant. The appellant was not a party to it. The fact that the assignment was not dated and was only stamped about a month after the writ in the instant appeal was filed supported the conclusion that no copy of the undated assignment was served on the appellant and that the assignment was kept with the respondent (see para 26).

(2) The only evidence of notice to the appellant of the assignment of payments to the respondent was in the form of the two notices served on the appellant. In their plain and literal meaning these two notices gave the appellant notice of the assignment of the payments due under the respective contracts but did not reflect the express language used in the undated assignment, ie that it was an assignment of payment for all contracts under the respective contracts. Further, the notices did not purport to extend a copy of the assignment. Thus, the appellant had no notice of the terms of the assignment other than what was stated in the notices. In the circumstances, no notice had been given to the appellant of the precise terms of the assignment of the contracts awarded under the 1996 contracts and the respondent's submission that the undated assignment was an absolute assignment had no merit (see paras 27–31 & 33).

(3) The trial judge failed to give judicial appreciation to this evidence thereby leading the High Court to an error of fact and a finding that it would otherwise not have made. The injustice caused as a result required appellate intervention (see para 34).

[Bahasa Malaysia summary

Pada masa tempoh di antara 1996 dan 1997, Dewan Bahasa dan Pustaka ('perayu') telah mengawardkan Benatulin Timur Sdn Bhd ('BTSB') tiga kontrak untuk membekal kertas dan kadbod, iaitu kontrak-kontrak 1996 dan 1997. Untuk menunaikan tanggungjawab membekalkan perayu, BTSB dilindungi oleh kemudahan kewangan daripada Merita Merchant Bank Singapore Ltd ('responden'). Sebagai jaminan untuk kemudahan ini, BTSB menyerahhakkan kesemua bayaran yang akan diterimanya daripada perayu kepada responden. Responden memfailkan tindakan sivil terhadap BTSB dan perayu akan memperolehi semula bayaran-bayaran untuk pembelian yang dibuat di bawah kontrak-kontrak 1996 dan 1997, yang mana telah diserahakkan kepadanya. Responden memperolehi penghakiman keingkaran

kehadiran terhadap BTSB tetapi perbicaraan penuh diteruskan di antara responden dan perayu. Adalah pembelaan perayu bahawa izinnya untuk penyerahhakkan hanya diperolehi untuk bayaran-bayaran di bawah kontrak-kontrak 1996 tetapi bukan kontrak 1997. Hakim perbicaraan berpendapat bahawa penyerahhakkan adalah mutlak dan bukan terhad kepada mana-mana kontrak tertentu dan bahawa pembekalan dibuat di bawah kontrak 1997 adalah lanjutan daripada kontrak-kontrak 1996. Dengan itu, perayu diperintahkan untuk membuat pembayaran berkaitan kontrak-kontrak 1996 dan kontrak 1997 kepada responden. Ini adalah rayuan perayu terhadap penghakiman tersebut. Perayu berhujah bahawa kontrak 1997 adalah kontrak berasingan daripada kontrak-kontrak 1996 dan sementara izinnya dipohon dan diperolehi kepada penyerahhakkan pembayaran-pembayaran di bawah kontrak-kontrak 1996, tiada izin yang sama dipohon di bawah kontrak 1997. Oleh itu, adalah kes perayu bahawa ia tidak terikat untuk membuat bayaran kepada responden. Responden mengekalkan bahawa penyerahhakkan kepadanya adalah penyerahhakkan mutlak dan notisnya diterima dan diizinkan oleh perayu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Walaupun penyerahhakkan menyokong kes untuk responden, hakim perbicaraan tersilap apabila beliau terlepas perhatian fakta yang tidak dapat dipertikaikan bahawa penyerahhakkan tersebut tidak dengan sendirinya menanggung persetujuan perayu. Perayu bukan pihak kepada perbicaraan. Fakta bahawa penyerahhakkan tidak bertarikh dan hanya disetem lebih kurang sebulan selepas writ dalam rayuan ini difailkan menyokong kesimpulan bahawa tiada salinan penyerahhakkan yang tidak bertarikh diserahkan kepada perayu dan bahawa penyerahhakkan tersebut disimpan dengan responden (lihat perenggan 26).

(2) Satu-satunya keterangan tentang notis kepada perayu mengenai penyerahhakkan bayaran kepada responden adalah dalam bentuk dua notis yang diserahkan ke atas perayu. Dalam maksud biasa dan literal kedua-dua notis ini memberi perayu notis penyerahhakkan bayaran yang perlu dibayar di bawah kontrak-kontrak masing-masing tetapi tidak mencerminkan bahasa nyata yang digunakan di dalam penyerahhakkan yang tidak bertarikh, iaitu ia adalah penyerahhakkan bayaran untuk kesemua kontrak di bawah kontrak-kontrak masing-masing. Selanjutnya, notis-notis tidak bermaksud untuk melanjutkan salinan penyerahhakkan tersebut. Perayu, dengan itu tidak mempunyai notis terhadap terma-terma penyerahhakkan kecuali apa yang dinyatakan di dalam notis-notis tersebut. Dalam keadaan ini, tiada notis yang diberikan kepada perayu mengenai terma-terma tepat penyerahhakkan kontrak-kontrak yang diawardkan di bawah kontrak-kontrak 1996 dan

hujahan responden bahawa penyerahhakkan yang tidak bertarikh tersebut adalah penyerahhakkan mutlak tidak bermerit (lihat perenggan 27–31 & 33).

(3) Hakim perbicaraan gagal untuk memberi penilaian kehakiman kepada keterangan ini dengan itu membawa Mahkamah Tinggi kepada kesilapan fakta dan dapatan yang sebaliknya tidak akan dibuatnya. Akibatnya menyebabkan ketidakadilan yang mengkehendaki campur tangan mahkamah rayuan (lihat perenggan 34).]

Notes

For cases on assignment of sum due, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2868–2870.

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1217–1245.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Public Finance Bhd v Scotch Leasing Sdn Bhd (In Receivership) (Perwira Habib Bank Malaysia Intervener) Scotch Leasing Sdn Bhd (In Receivership) (Perwira Habib Bank Malaysia Intervener) [1996] 2 MLJ 369; [1996] 3 CLJ 635, FC (refd)

UMW Industries (1985) Sdn Bhd v Ah Fook [1996] 1 MLJ 365; [1996] 1 CLJ 379, FC (refd)

Appeal from: Civil No D6–22–69 of 1998 (High Court, Kuala Lumpur)

Sarah Abishegam (J Doshi with her) (Abdulah & Zainudin) for the appellant. Ong Chee Kwan (Lee Ong & Kandiah) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The respondent/plaintiff Merita Merchant Bank Singapore Ltd ('Merita') had sued the appellant/second defendant Dewan Bahasa dan Pustaka ('DBP') for sums claimed to have been assigned to it, and obtained judgment in the sum of RM6,206,547.62 and RM584,000 with interest at the rate of 8% from 22 April 1998 to the date of full settlement, and costs. We note a slight discrepancy in the notice of appeal (RR1:15) stating the sum as RM6,206,547.62 and the date as 24 April 1998.

[2] The first defendant was Benatulin Timur Sdn Bhd ('Benatulin'), against whom a judgment in default had been obtained earlier. The High Court was informed that the judgment against Benatulin could not be executed because

the company was no longer in existence.

BACKGROUND

[3] In 1996–1997, DBP had awarded three contracts to Benatulin for the supply of paper and cardboard to DBP. These are:

(a) contracts for tender 3/96, (exhs D21 at RR7:1027 and D22 at RR7:1044) ('the 1996 Contracts') up to 31 December 1996; and

(b) contract from 3 August 1997 (exh D28 at RR7:1068-87) ('the 1997 contract').

[4] In order to honour its supply obligations to DBP, Benatulin as with non-manufacturing traders, obtained supplies from other parties. The gap between the time of payment to its own suppliers and when it would receive payment from DBP was covered by a financing facility from Merita, and as security, Benatulin assigned all payments to it by DBP to Merita.

[5] Exhibit P2 (RR6:924-5) is the undated assignment stamped on 22 April 1998. Exhibit P3 (RR6:926) is the notice dated 23 August 1996 by Merita to DBP of the assignment. A notice dated 27 August 1996 by Benatulin to DBP is at exh D23 (RR7:1059).

[6] Exhibit D24 (RR7:1060) is the consent dated 2 September 1996 by DBP to the assignment at exh P2.

[7] In 1998, Merita filed Civil Suit D6-22–691 of 1998 against Benatulin and DBP to claim for payments for purchases made after the expiry of the 1996 contracts validity period. A judgment in default of appearance having been obtained against Benatulin earlier, the full trial proceeded between Merita and DBP only.

THE CLAIM AND THE DEFENCE IN THE HIGH COURT

[8] Merita's claim is founded upon the assignment at exh P2, which it maintains applies to all supplies under tender 3/1996 and extensions thereof.

[9] The DBP defence is that the assignment for which its consent was obtained was for payments under the 1996 contract, and does not encompass supplies made after the expiry of the 1996 contracts. Since Merita's claim relate to payments for supplies under the letters at exhs P7, P8 and P9, which do not fall under the 1996 contract, there was no legal obligation upon DBP to release payments therefor to Merita.

[10] On 6 April 2010, the High Court allowed the claim by Merita. DBP appealed to this court.

APPEAL SUBMISSIONS FOR DBP

[11] Written submissions for the appellant had been filed before this court as previously directed.

[12] Relying upon the written submissions, Ms Jyotsana Doshy proceeded with further oral submissions. She had appeared for DBP in the High Court.

[13] She presented the appeal case for DBP as follows:

(a) the letter of appointment/award dated 30 April 1997 (exh D25 at RR7:1062-3) containing the qualification accepted by Benatulin vide letter 7 May 1997 (exh D26): '3. Adalah dimaklumkan pelantikan syarikat tuan ini tertakluk kepada syarat-syarat sepertimana yang terkandung di dalam perjanjian yang akan ditandatangani di antara Dewan Bahasa dan Pustaka dengan pihak tuan' meant that the 1997 contract was a separate contract from the 1996 contract;

(b) while assignment (exh P2) of the rights to receive payments to Merita were consented to (exh D24), it was for contract purchases by DBP under the 1996 contracts, and there was no similar consent sought and obtained from DBP for supplies subsequent to the 1996 contracts;

(c) before the 1997 contract was entered into there were other albeit smaller purchases under purchase orders, and where the relevant invoices contained endorsements for payment to Merita, payments were released to Merita;

(d) cl 23 of the 1997 contract was similar to cl 24 under the 1996 contracts. Consent having been given 10 October 1997 exh P41 (RR10:1532) thereunder for payments due to Benatulin to be released to Consolidated Forest Products Sdn Bhd ('CFP'), payments were released by DBP accordingly until notified otherwise per letter 26 February 1998 exh IDD37 (RR8:1191) by CFP;

(e) further payments thereafter, not carrying any indorsements for payment to CFP or Merita, were released to Benatulin;

(f) there was no consent sought and obtained specifically under cl 23 of the 1997 contract for the payments for purchases under the 1997 contract to be made to Merita; and

(g) since there was no consent sought and obtained for assignment of payments under the 1997 contract to Merita, DBP was not bound to make payments to Merita.

A MERITA'S SUBMISSIONS ON THE APPEAL

[14] Written submissions had also been filed for Merita. To that, Mr Ong Chee Kwan, who had also appeared for Merita in the High Court, added his oral submissions.

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[15] He submitted that all payments the subject of the claim by Merita emanate from exhs P7, P8 and P9 (RR4:414, 417 and 419), and that it was common ground that if the supplies came under tender 3/96, the payments had been assigned to Merita and ought to be released to it and not to any other party.

C

[16] He submitted that the High Court came to the conclusion the supplies did come under tender 3/96 by reference to the letter 2 June 1997 (RR3:360):

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> Sukacita dimaklumkan bahawa pelantikan semula syarikat tuan adalah sebagai lanjutan kepada kontrak pembekalan kertas tender 3/96 Prakelayakan Pembekal Kertas Dewan Bahasa dan Pustaka 1996.

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[17] He submitted this was also confirmed by SD1 (RR4:124).

[18] It was also submitted that the asssignment to Merita was an absolute assignment and notice of it was received and consented to by DBP.

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[19] Referring to the Merita's notice to DBP dated 23 August 1996 (RR6:926) and DBP's letter to Benatulin dated 2 September 1996 (RR7:1060) in respect of payments to be made directly to Merita, he pointed out these letters referred to tender 3/96 and the consents cannot be confined to the supplies before the extension.

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[20] We do not propose to repeat his submissions in extenso. It suffices that counsel agreed with and relied upon the grounds of decision of the High Court.

H OBSERVATIONS

[21] The basic reasoning, in this case, by the High Court was that:

(a) the assignment exh P2 was absolute, and is not limited to any particular contract;

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(b) the 1997 contract was an extension of contracts under the tender 3/96;

(c) the supply made under the 1997 contract was therefore supply under an extension of tender 3/96;

(d) therefore payments for purchases invoiced by exhs P7, P8 and P9 fell under the assignment P2;

(e) since the assignment at exh P2 had been consented to by DBP, DBP was bound to release payments to Merita;

(f) DW4 could not explain why invoices before 7 October 1997 and not under the 1996 contract were paid to Merita; and

(g) therefore the payments made to CFP and Benatulin under the 1997 contract ought to have been released to Merita.

[22] Paragraphs 21(a)–(f) are stages in a process of reasoning leading to the conclusion at (g). On the other hand, the two primary findings at (a) and (b) by the High Court, that (i) the assignment at exh P2 was absolute and not confined to any particular contract, and (b) after the ending of the 1996 contracts, the pre- and the post-1997 contract supplies were an extension of the contracts under the tender 3/1996, are findings of fact that are an inference or conclusion drawn necessarily by a process of reasoning from other facts and evidence.

[23] In any appeal, the question before an appellate court is whether in making the findings of fact the trial court had erred in law or principle, or by relying upon facts or evidence contrary to any uncontroverted fact or evidence, or by failing to give due judicial appreciation to any fact or evidence, and which error led to an injustice that requires appellate intervention to remedy.

REASONING AND CONCLUSION

[24] The notices and the assignment were not disputed as to authenticity and admissibility. The material issue between the parties is as to what assignment DBP had notice of. This necessarily turns on what notice was given to DBP.

[25] Examination of the assignment at exh P2 shows that it was an assignment, transfer and set-over by Benatulin to Merita of:

(a) all its rights title and interest, and all monies due or which may thereafter become due;

(b) irrevocably and unconditionally;

(c) in and to the commercial contracts; and

(d) made from time to time between itself and DBP.

[26] Although the assignment supports the case for Merita, the learned judge

erred when she overlooked the undisputed fact that the assignment does not itself bear the assent of DBP. DBP was not a party to it. That the DBP tender 3/96 was mentioned does not make DBP a party. The fact that the assignment was not dated and was only stamped about a month after the writ in the instant appeal was filed supports the conclusion no copy of exh P2 was served on DBP and the assignment was kept with Merita.

[27] The only evidence of notice to DBP of assignment of payments to Merita was in the form of the notices of 23 August 1996 and 5 November 1996 (RR6:926 and RR6:927). These notices were entitled:

(a) RE: THE CONTRACT SIGNED BETWEEN BENATULIN TIMUR SDN BHD, MALAYSIA & YOUR GOODSELVES DATED AUGUST 09, 1996 TENDER NO 3/96 (HEREINAFTER CALLED 'CONTRACT') FOR THE DELIVERY OF PRINTING PAPER TO YOU FOR VALUE MALAYSIAN RINGGITS 7,504,500.

(b) RE: THE CONTRACT SIGNED BETWEEN BENATULIN TIMUR SDN BHD, MALAYSIA & YOUR GOODSELVES DATED SEPTEMBER 17, 1996 TENDER NO 7/96 (HEREINAFTER CALLED 'THE CONTRACT') FOR THE DELIVERY OF PRINTING PAPER TO YOU FOR VALUE MALAYSIAN RINGGITS 770,400.

[28] These notices contained language respectively as follows:

(a) We wish to inform you that Benatulin Timur Sdn Bhd … has irrevocably and unconditionally assigned, transferred and set-over unto us, our successors and assigns, all their rights, title and interest in and to the above Contract and all monies due or which may hereinafter become due thereon.

(b) We wish to inform you that Benatulin Timur Sdn Bhd … has irrevocably and unconditionally assigned, transferred and set-over unto us, our successors and assigns, all of their rights, title and interest in and to the above Contract and all monies due or which may hereinafter become due thereon.

[29] It was to the above language that DBP was asked to signify its agreement and acceptance by signing the duplicate copy of the notice. Though DBP became bound by signifying its agreement and acceptance, it became bound only upon the terms of these two notices, and not upon the wider terms of the assignment to which it was not a party and of which, evidently, no copy was extended to it for the purpose of giving notice of its terms.

[30] In their plain and literal meaning, these two notices gave notice of the assignment of the payments due under the respective contracts dated

8 September 1996 and 17 September 1996 as stated in the notices. Although there was mention in the notices of tender 3/96, it was in reference to the two specific contracts mentioned. The significance is that the tender 3/1996 pre-qualified Benatulin to enter into sale and purchase contracts with DBP as and when supplies were needed. The language used in the notices do not support the submission made that the notices gave notice of the assignment of payments under all contracts under the respective tenders. The notices did not reflect the express language used in the assignment at exh P2 which was an assignment of payments for all contracts under the respective tenders.

[31] The notices themselves did not purport to extend a copy of the assignment. The only conclusion that can be drawn is that DBP had no notice of the terms of the assignment other than what was stated in the notices and to which it agreed and accepted. Therefore, the fact that the assignment (exh P2) was an assignment of all payments under all contracts as and when issued is of no assistance to the Meritas' case against DBP since Merita did not give notice of such terms to DBP.

[32] DBP was, therefore, not bound to Merita to refuse to recognise instruction by Benatulin to make payment to CFP on contracts other than stated in the two notices. The fact DBP complied with the instruction of Benatulin to cease payments to CFP and to release subsequent payments to Merita serve only to prove the DBP at all times acted on instructions of Benatulin as to where to release the payments to. It does not, however, 'prove' DBP had notice of the assignment on the terms as in exh P2 prior to the instructions to make payments to CFP.

[33] The submissions that the assignment at exh P2 is an absolute assignment or not provides no assistance to the case for Merita if no notice was given to DBP of its precise terms that it was an assignment of all payments under all contracts awarded under tender 3/1996. Failure to give such notice amounts to not giving notice. See *Public Finance Bhd v Scotch Leasing Sdn Bhd (In Receivership) (Perwira Habib Bank Malaysia Intervener) Scotch Leasing Sdn Bhd (In Receivership) (Perwira Habib Bank Malaysia Intervener)* [1996] 2 MLJ 369; [1996] 3 CLJ 635 (FC); *UMW Industries (1985) Sdn Bhd v Ah Fook* [1996] 1 MLJ 365; [1996] 1 CLJ 379 (FC); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 (FC).

[34] With respect, the learned judge failed to give judicial appreciation to this evidence, leading the High Court to an error of fact and a finding it would otherwise not have made, and causing an injustice that requires appellate intervention.

[35] In the circumstances, we allow the appeal and set aside the order of the High Court with costs.

Appeal allowed with costs.

Reported by Kohila Nesan